

**\*E-FILED 10-14-2010\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DESIREE MARIE GEORGE,

No. C10-03928 HRL

Plaintiff,

**ORDER THAT CASE BE REASSIGNED  
TO A DISTRICT COURT JUDGE**

v.

**REPORT AND RECOMMENDATION**

NEW CENTURY MORTGAGE  
CORPORATION; CARRINGTON  
MORTGAGE SERVICES; ATLANTIC &  
PACIFIC FORECLOSURE SERVICES; and  
DOES 1-100,

**[Re: Docket Nos. 4 and 5]**

Defendants.

**BACKGROUND**

Pro se plaintiff Desiree Marie George sues for alleged statutory and common law violations in connection with her home mortgage. George filed a complaint in state court, asserting ten claims for relief: (1) "Predatory Lending Practices"; (2) "Conspiracy"; (3) "Intentional Misrepresentation/Deceit (Fraud)"; (4) "Intentional violation of Statutes (Cal. C.C. 1916.7, 1920)"; (5) "Demand for Accounting"; (6) "Unfair Business Practices (Cal. Corp. Code 10130; 17200; 17500)"; (7) "Breach of Implied Warranty of Good Faith and Fair Dealing"; (8) "Declaratory Relief"; (9) "Quiet Title"; and (10) "Injunctive Relief."

Defendant Carrington Mortgage Services (Carrington) says that it is the loan servicer. Defendant Atlantic & Pacific Foreclosure Service (Atlantic) says that it is the successor trustee.

1 Noting that plaintiff's complaint alleges violations of the Home Ownership and Equity  
2 Protection Act (HOEPA), the Truth in Lending Act (TILA), Federal Reserve Regulation Z, and  
3 the Real Estate Settlement Procedures Act (RESPA), Carrington and Atlantic removed the  
4 matter here, asserting federal question jurisdiction.

5 Carrington and Atlantic now move to dismiss the complaint and to expunge *lis pendens*.  
6 The record reflects that the moving papers were served on George, but she failed to file any  
7 response to the motions and did not appear at the motion hearing.<sup>1</sup> The moving defendants have  
8 expressly consented that all proceedings in this matter may be heard and finally adjudicated by  
9 the undersigned. 28 U.S.C. § 636(c); FED. R. CIV. P. 73. George has not complied with this  
10 court's order setting a September 17, 2010 deadline to file either a consent or declination to  
11 proceed before a United States Magistrate Judge. Accordingly, this case shall be reassigned to  
12 a District Court Judge. Upon consideration of the moving papers,<sup>2</sup> as well as the arguments  
13 presented at the motion hearing, this court recommends that defendants' motion to dismiss be  
14 granted with leave to amend and that defendants' motion to expunge *lis pendens* be granted.

#### 15 DISCUSSION

##### 16 A. Motion to Dismiss (Fed. R. Civ. P. 12(b)(6))

17 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests  
18 the legal sufficiency of the claims in the complaint. "Dismissal can be based on the lack of a  
19 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
20 theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Documents  
21 which properly are the subject of judicial notice may be considered along with the complaint  
22 when deciding a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim for relief. *See*  
23 *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

24 In such a motion, all material allegations in the complaint must be taken as true and  
25 construed in the light most favorable to the claimant. *See Balistreri*, 901 F.2d at 699. However,

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26  
27 <sup>1</sup> After the motion hearing, plaintiff contacted this court's chambers to say that  
she mistakenly believed the hearing was set for October 13, 2010.

28 <sup>2</sup> It is recommended that defendants' request for judicial notice be granted  
pursuant to Fed. R. Evid. 201.

1 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
 2 statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Moreover, “the  
 3 court is not required to accept legal conclusions cast in the form of factual allegations if those  
 4 conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*  
 5 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

6 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the  
 7 claim showing that the pleader is entitled to relief.” This means that the “[f]actual allegations  
 8 must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v.*  
 9 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). *See*  
 10 *also Iqbal*, 129 S. Ct. at 1950 (“[O]nly a complaint that states a plausible claim for relief  
 11 survives a motion to dismiss.”). However, a complaint attacked by a Rule 12(b)(6) motion to  
 12 dismiss does not need detailed factual allegations and “heightened fact pleading of specifics” is  
 13 not required to survive a motion to dismiss. *Bell Atlantic Corp.*, 550 U.S. at 570. Rather, the  
 14 complaint need only give “enough facts to state a claim to relief that is plausible on its face.”  
 15 *Id.*

#### 16 Ability to Tender

17 As a threshold matter, defendants argue that all claims asserted in the complaint must be  
 18 dismissed because plaintiff has not alleged tender of amounts required to cure her default.  
 19 Defendants also contend that plaintiff is incapable of performing tender.

20 In the context of claims arising under TILA, the Ninth Circuit has held that a district  
 21 court may alter the statutory rescission procedures and has “discretion to condition rescission on  
 22 tender by the borrower of the property he had received from the lender.” *Yamamoto v. Bank of*  
 23 *New York*, 329 F.3d 1167, 1171 (9th Cir. 2003) (internal quotation marks and citation omitted).  
 24 District courts within the Ninth Circuit have adopted different understandings of *Yamamoto*;  
 25 one line of cases reads it to require a plaintiff to plead the present ability to tender the loan  
 26 proceeds in order to survive a motion to dismiss, while another line holds that it does not. *See*  
 27 *Kakogui v. Amer. Brokers Conduit*, No. C09-4841 JF (HRL), 2010 WL 1265201, at \*4 (N.D.  
 28 Cal. Mar. 30, 2010) (collecting cases). To the extent plaintiff seeks rescission under TILA, this

1 court agrees that “while a borrower must ultimately demonstrate ability to tender to prove a  
2 claim for TILA rescission on the merits, he or she need not allege this ability at the pleading  
3 stage.” *Davenport v. Litton Loan Servicing, LP*, — F. Supp.2d —, No. C10-0679RS, 2010 WL  
4 3218592 \*11 (N.D. Cal., July 16, 2010). *See also Botelho v. U.S. Bank, N.A.*, 692 F.Supp.2d  
5 1174 (N.D. Cal. 2010) (same).

6 It is not clear, however, that such flexibility is appropriate with respect to a claim for  
7 rescission under California law. “[C]ourts in California continually treat tender or at least the  
8 allegation of ability to do so as a necessary part of a valid claim for rescission of a contract.”  
9 *Davenport*, — F. Supp.2d —, 2010 WL 3218592 at \*11. Here, George has not asserted a claim  
10 for rescission *per se*. Nevertheless, liberally construed, the complaint does assert a “right of  
11 rescission” and seeks judgment that the loan agreement is “void ab initio by operation of law”  
12 due to defendants’ alleged fraud. (Complaint ¶¶ 15, 61, 67). Accordingly, to the extent George  
13 seeks to rescind the loan under state law, she must at least allege that she has offered to tender.  
14 *Davenport*, — F. Supp.2d —, 2010 WL 3218592 at \*11. Although plaintiff says that she will  
15 “tender any liens against the Subject Property” (Complaint ¶ 68), it is not apparent to this court  
16 that such an offer is the same as an offer to tender the outstanding portion of her loan. It is  
17 recommended that defendants’ motion to dismiss on this issue is granted.

18 Claim 1 – “Predatory Loan Practices”

19 This claim purports to cover alleged violations of HOEPA, TILA, Federal Reserve  
20 Regulation Z, California Civil Code § 1632, and California Bus. & Prof. Code § 17500. The  
21 complaint alleges conduct by defendant New Century Mortgage Corporation (the lender), but  
22 nonetheless indiscriminately groups all defendants together with conclusory assertions.  
23 Moreover, the complaint fails to describe the conduct of each defendant that constitutes a  
24 violation of any particular provision of the identified statutes. Plaintiff has not pled this claim  
25 with sufficient particularity to give defendants adequate notice of the claims against them. It is  
26 recommended that defendants’ motion to dismiss this claim be granted.

Claim 2: Conspiracy

“A conspiracy is not an independent cause of action, but is instead ‘a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.’” *Davenport*, — F. Supp.2d —, 2010 WL 3218592 at \*12 (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-11, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994)). “Liability for civil conspiracy generally requires three elements: (1) formation of a conspiracy (an agreement to commit wrongful acts); (2) operation of a conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of a conspiracy.” *Id.* “A civil conspiracy is therefore activated by the commission of an underlying wrongful act.” *Id.*

Here, plaintiff asserts that Carrington and Atlantic “planned, schemed, designed and illegally conspired” with New Century Mortgage to “steal” her property by initiating a trustee’s foreclosure sale “without proper statutorily mandated Loan Docs and subsequent notices.” (Complaint ¶¶ 30-31). However, the complaint does not sufficiently allege what documents and notices Carrington and Atlantic were required, but failed, to possess or provide. And, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” *Bell Atlantic Corp.*, 550 U.S. at 556. *See also Davenport*, — F. Supp.2d —, 2010 WL 3218592 at \*13 (same). It is recommended that defendants’ motion to dismiss this claim be granted.

Claim 3: Intentional Misrepresentation

A “party must state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). Allegations of fraud must be stated with “specificity including an account of the ‘time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). To survive a motion to dismiss, “‘allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.’” *Id.* (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

Here, the complaint alleges that defendant New Century Mortgage misled plaintiff as to the terms and conditions of the subject loan (or failed to fully disclose them to her), failed to verify her ability to repay the loan, and lowered its underwriting standards in order to dupe plaintiff into accepting the terms of the loan. (Complaint ¶¶ 36-37). Then, without distinguishing between defendants, the complaint goes on to allege, in conclusory fashion, that all defendants “repeat[ed] the same fraud” by “making untrue and misleading statements about the terms of the Subject Loan.” (*Id.*). The court finds that the elements of fraud are not sufficiently alleged. *Bell Atlantic Corp.*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”); *Iqbal*, 129 S. Ct. at 1950 (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”). It is recommended that defendants’ motion to dismiss this claim be granted.

Claim 4: Violation of Civil Code §§ 1916.7, 1920, 1921

The complaint alleges that all defendants “entered into an illegal pooling agreement” in violation of California Civil Code sections 1916.7, 1920 and 1921. (Complaint ¶ 41). Briefly stated, these statutes govern lending practices with respect to adjustable-rate mortgages. The complaint, however, does not sufficiently allege the existence of any “pooling agreement,” and then goes on to allege only that defendants “failed to satisfy the requirements of an adjustable mortgage instrument as set forth in California C.C. § 1920, and the requirements for disclosure of information and connections with a mortgage instrument, as set forth, required by [sic] California C.C. § 1921.” (*Id.*). The identified statutes contain several requirements for adjustable rate mortgages, but the complaint does not state those requirements. Nor does it describe the conduct of defendants that constitutes a violation of any specific requirement. Accordingly, it is recommended that defendants’ motion to dismiss this claim be granted.

Claim 5: Demand for Accounting

“The right to an accounting is derivative and depends on the validity of a plaintiff’s underlying claims.” *Wong v. First Magnus Fin. Corp.*, No. C09-01612RMW, 2009 WL 2580353 \*2 (N.D. Cal., Aug. 20, 2009) (citing *Duggal v. G.E. Capital Communication Serv., Inc.*, 81 Cal. App.4th 81, 95, 96 Cal. Rptr.2d 383 (2000); *Union Bank v. Super. Ct.*, 31 Cal.

App.4th 573, 593-94, 37 Cal. Rptr.2d 653 (1995)). Here, plaintiff does not allege that she is due any monies from defendants. Instead, the gist of her complaint is that she wants an accounting to ascertain the “true amount of money” that she may owe them. (Complaint ¶ 44). Absent a claim that she is due monies from defendants, she has no right to an accounting. *Wong*, 2009 WL 2580353 \*2 (citing *Baxter v. Krieger*, 157 Cal. App.2d 730, 732, 321 P.2d 879 (1958)). Moreover, the court concludes that plaintiff has not sufficiently pled any of her claims of misconduct against defendants. Accordingly, it is recommended that defendants’ motion to dismiss this claim be granted.

Claim 6: Unfair Business Practices (Cal. Bus. & Prof. Code § 17200, 17500)

California’s Unfair Competition Law (“UCL”) prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” CAL. CIV. CODE § 17200. “‘Violation of almost any federal, state, or local law may serve as the basis for a[n] unfair competition claim.’” *Brewer v. Indymac Bank*, 609 F. Supp.2d 1104, 1122 (E.D. Cal. 2009) (quoting *Plascencia v. Lending 1st Mortgage*, 583 F. Supp.2d 1090, 1098 (N.D. Cal. 2008)). “A complaint based on an unfair business practice may be predicated on a single act; the statute does not require a pattern of unlawful conduct.” *Id.* However, facts supporting the statutory elements of the alleged violation must be stated with reasonable particularity. *See Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1316 (N.D.Cal. 1997).

Because this court recommends that the underlying claims as to Carrington and Atlantic should be dismissed, it is recommended that plaintiff’s UCL claim also be dismissed.

Claim 7: Breach of the Implied Covenant of Good Faith and Fair Dealing

Although the caption of the complaint lists a seventh claim for relief, there is no separate seventh claim for relief set out in the body of the pleading. Instead, allegations as to the alleged breach of the implied covenant and good faith and fair dealing are set out under her sixth claim for alleged unfair business practices. Nevertheless, the gist of the allegations is that defendants owed a duty of care to plaintiff.



“[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal. App.3d 1089, 1095, 283 Cal. Rptr. 53 (1991). Courts have applied this rule to loan servicers. *See, e.g., Hendrickson v. Popular Mortgage Servicing, Inc.*, No. C09-00472 CW, 2009 WL 1455491 \*7 (N.D. Cal., May 21, 2009); *Marks v. Ocwen Loan Servicing, Inc.*, No. C07-02133 SI, 2009 WL 975792 \*7 (N.D. Cal., Apr. 10, 2009). Plaintiff has not alleged that Carrington’s involvement in the loan transaction exceeded the scope of its conventional role as loan servicer. As for Atlantic, “[t]he trustee in a nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary.” *Pro Value Properties, Inc. v. Quality Loan Service Corp.*, 170 Cal. App.4th 579, 583, 88 Cal. Rptr.3d 381 (2009) (citing *Vournas v. Fidelity Nat. Title Ins. Co.*, 73 Cal. App.4th 668, 677, 86 Cal. Rptr.2d 490 (1999)). “The scope and nature of the trustee’s duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist.” *Id.* It is recommended that defendants’ motion to dismiss this claim be granted.

Claim 8: Declaratory Relief

Declaratory relief “is correctly understood as a form of relief,” rather than a separate claim. *Davenport*, — F. Supp.2d —, 2010 WL 3218592 at \* 11. Here, the complaint alleges that the subject loan, and the initiation of foreclosure proceedings, are void because of defendants’ alleged fraudulent and predatory loan practices. (Complaint ¶¶ 61-62). Because the court concludes that plaintiff has not sufficiently pled any of her claims of misconduct against defendants, it is recommended that her claim for declaratory relief also be dismissed.

Claim 9: Quiet Title

“An action may be brought . . . to establish title against adverse claims to real or personal property or any interest therein.” CAL. CODE CIV. PROC. § 760.020(a). To state a claim for quiet title, a complaint must include: (a) a description of the property that is the subject of the action; (b) plaintiff’s title and the basis of for that title; (c) the adverse claims to plaintiff’s title; (d) the date as of which the determination is sought; and (e) a prayer for the



determination of the title of the plaintiff against the adverse claims. CAL. CODE CIV. PROC. § 761.020. Here, plaintiff's quiet title claim is premised upon the alleged fraudulent conduct of the defendants. The complaint alleges that defendants cannot proceed with foreclosure "until the results of their fraudulent acts are resolved." (Complaint ¶ 69). Because the court finds that the complaint fails to allege defendants' alleged fraudulent conduct with sufficient particularity, it is recommended that her quiet title claim be dismissed. *See, e.g., Davenport*, — F. Supp.2d —, 2010 WL 3218592 at \*12 (dismissing quiet title claim where plaintiff failed to plead an adequate basis for relief).

Claim 10: Injunctive Relief

Although the caption of the complaint lists "Injunctive Relief" as a separate claim, injunctive relief is a form of relief rather than an actual claim. Here, plaintiff seeks to enjoin defendants from foreclosing on her property. As discussed above, however, the court finds that her complaint fails to state a viable claim for relief. Accordingly, it is recommended that plaintiff's "claim" for injunctive relief be dismissed.

B. Motion to Expunge Lis Pendens

"A *lis pendens* is a 'recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice.'" *Valdez v. America's Wholesale Lender*, No. C09-02778JF(RS), 2009 WL 5114305 \*2 (N.D. Cal., Dec. 18, 2009) (quoting *Urez Corp. v. Super. Ct.*, 190 Cal. App.3d 1141, 1144, 235 Cal. Rptr. 837 (1987)). "The practical effect of a *lis pendens* is to cloud the property's title and prevent its transfer until the litigation is resolved or the *lis pendens* is expunged or released." *Id.* "The court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." *Id.* (quoting CAL. CODE CIV. PROC. § 405.32). Additionally, the court shall award the party prevailing on a motion to expunge *lis pendens* reasonable attorney's fees and costs of making or opposing the motion, unless the court finds that the other party acted with substantial justification or that other circumstances make such an award unjust. *Id.* (quoting CAL. CODE CIV. PROC. § 405.38).

1 Because the court recommends dismissal of all of plaintiff's claims, and in view of  
2 plaintiff's failure to oppose defendants' motions, it is recommended that defendants' motion to  
3 expunge *lis pendens* be granted. *See, e.g., Valdez*, 2009 WL 5114305 at 9; *Smith v. Wachovia*,  
4 No. C09-01300SI, 2009 WL 1948829 at \*6 (N.D. Cal., July 6, 2009). Nevertheless, this court  
5 also finds that, in view of plaintiff's apparent financial difficulties, an award of attorney's fees  
6 and costs would be unjust. Accordingly, the undersigned recommends that defendants' request  
7 for an award of attorney's fees and costs be denied.

#### 8 RECOMMENDATION

9 Based on the foregoing, this case shall be reassigned to a District Court Judge, with the  
10 recommendation that defendants' motion to dismiss be granted with leave to amend and that  
11 defendants' motion to expunge *lis pendens* be granted.

12 Pursuant to Federal Rule of Civil Procedure 72(b), any party may serve and file  
13 objections to this Report and Recommendation within fourteen days after being served.

14 Dated: October 14, 2010

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18 HOWARD R. LOTT  
19 UNITED STATES MAGISTRATE JUDGE  
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1 5:10-cv-03928-HRL Notice electronically mailed to:

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4 Counsel are responsible for distributing copies of this document to co-counsel who have not  
5 registered for e-filing under the court's CM/ECF program.

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